No. 3953

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH DISTRICT

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, et al.,

Appellees.

Brief of Appellant Washington Brick, Lime & Sewer Pipe Company

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Statement of the Case

On February 28th, 1920, the Washington Brick, Lime & Sewer Pipe Company, a corporation, entered into a contract, in writing, with the Scandinavian American Building Company, a corporation, to furnish terra cotta for a proposed building for the Scandinavian American Bank at Tacoma, in conformity with plans and specifications, at a price of $109,000.00.

Terra cotta is used for facing buildings and is made from clay, according to special designs of the

architect and has very little, if any, value except for use in the structure for which it is made.

The process of manufacture of terra cotta is substantially this: Drawings are furnished by the architect showing the design and size of each piece and its position in the building. From these drawings the manufacturer makes a schedule of the different pieces giving each a number. A plaster paris mold is made for each unit. Plastic clay is pressed into it and after setting a sufficient period the mold is taken apart and placed in a dry room. After drying a coat of glazing is put on, after which it is placed in the kilns and subjected to intense heat. It is then assembled, fitted and marked, showing its position in the building according to the drawings.

Appellant immediately entered upon the execution of its contract. Material of the value of $58,657.50 according to contract price, was shipped to Tacoma. The remainder was in various stages of completion; $10,350.00 in value, was burned but not fitted; $5629.05 pressed; $13,010.31 molded and $34.02 in drafting. (Tr. p. 796).

The first shipment was made September 17th, 1920, and the last Januray 13th, 1921. Shortly thereafter, the Scandinavian American Bank of Tacoma failed and work on the building suspended.

At the date of the failure of the bank a large amount of labor had been expended and material

used in the structure and the steel frame practically completed.

A payment of $20,000.00 was made on account August 13th, 1920.

In due course, appellant executed and caused to be filed according to law, a notice of claim of lien on the real estate on which the improvements were made.

A cross-complain was filed to foreclose this lien, resulting in a decree denying appellant a right of lien but giving judgment against the building company for damages for $72,511.13, interest and costs (Tr. p. 519).

From this decree and the refusal of the Court concerning matters hereinafter assigned as errors, the Company has appealed.

Assignments of Error

I.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and shipped to Tacoma, Washington, and stored ready for delivery and use, for the reason that under the statutes of the State of Washington, in such cases, this appellant was entitled to a statutory materialman's lien therefor.

II.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and stored at its plant, for the reason that under the statutes of the State of Washington, in such cases this appellant was entitled to a statutory material man's lien therefor.

III.

The District Court erred in holding that no part of the terra cotta fabricated by this appellant was delivered to the Scandinavian American Building Company, for the reason that the same is contrary to the evidence in the case.

IV.

The District Court erred in holding that the title to the terra cotta fabricated by this appellant was at all times vested in it, for the reason that the same is contrary to the evidence in the case.

V.

The District Court erred in giving and granting to all of the lien claimants (except the laborers named in paragraphs IV and V of the decree) to whom statutory liens were decreed, a status prior and superior to this appellant, for the reason that under the evidence in the case and the law of the State of Washington, this appellant was entitled to have its claim, for material fabricated, established

as of the same rank as the material men's liens which are decreed.

VI.

The District Court erred in holding that, under the statutes of the State of Washington, no lien can be established or decreed, except for material delivered upon the premises of the building, for the reason that the statutes and laws, of the State of Washington, do not prescribe that delivery must be made at any specified place.

VII.

The District Court erred in failing and refusing to decree that the Scandinavian American Bank and the Scandinavian American Building Company were one corporation in equity, for the reason that under the evidence in the case, the corporations were identical.

VIII.

The District Court erred in not allowing to this appellant an attorney's fee, in at least the sum of $5,8000.00, as a part of the judgment in its favor.

IX.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of monies paid in procuring the assignment of the mortgage, referred to in paragraphs thirty-four of the judgment, in the sum of $72,366.35, and interest

amounting to $4,293.73, for the reason that such judgment is contrary to the law and the evidence.

X.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of monies advanced by the Scandinavian American Bank to and for the benefit of the Scandinavian American Building Company, in the sum of $232,094.42, and interest amounting to $19,136.62, for the reason that such judgment is contrary to the law and the evidence.

XI.

The District Court erred in denying appellant's claim of lien, for the reason that the judgment operates to deprive this appellant of its property without due process of law.

In this argument, Assignments of Error, I to VI, will be grouped.

These assignments involve questions of law. There is no material dispute of fact.

The witness M. L. Bryan, Superintendent of the Terra Cotta Department of Appellant, testified:

Mr. Sherman Wells was superintendent of construction of the building, under Mr. Frederick Webber, architect, who resided at Philadelphia. He visited appellant's plant in June, 1920. At that time some of the material was manufactured and ready for shipment and was stored at the plant.

At that time, Mr. Wells stated that he desired to assemble all material for the building in Tacoma so that he would have no delay with setting the terra cotta. He stated he wanted the material at Tacoma so that they could have access to it as he needed it. As the material was shipped, a checking list was made for each car of material as it left the factory and a duplicate copy sent to the Building Company at Tacoma. Mr. Wells stated that he could not take the material at the building as there was no room to store it. (Bryan Tr. p. 796).

After this visit, Mr. Bryan again talked with Wells regarding a place to store the material and Mr. Wells arranged a meeting with a transfer man to adopt plans to store the same.

The object of having the material at Tacoma was to avoid delay in case of breakage.

The material was finally placed at the end of the Great Northern Railway Company's freight sheds, in Tacoma. It is not practical to store material of this character at the building site because of its bulk (Exhibits 131-132-133). It would have been impossible to carry on other construction work and at the same time receive the material at the building (Bryan Tr. pp. 797-8).

This material was shipped to Tacoma and consigned to the Local-Long Distance Transfer Co. They took care of it for the Washington Brick,

Lime & Sewer Pipe Co., transferring it to the storage yards. We employed them and paid the expense and I think our Company paid the rent on the storage yard (Bryan Tr. II. p. 805).

A. B. Fosseen, President of the Appellant testified:

I had conversations with representatives of the Building Company in reference to delivery of materials at Tacoma. Mr. Wells was greatly perturbed over the non delivery of steel and feared he was going to be delayed on the terra cotta.

In November, Wells said:

> "Mr. Fosseen, now rush this terra cotta here as fast as you can and I will see that it is taken care of, that it is checked, and you can't crowd me too fast. I want the material here as fast as I can get it." (Fosseen Tr. II, p. 810).

Again, in December, Mr. Wells stated that as the material was received it was checked by a representative of the building company. The checking consisted of the placement so that it would be easy to move it to the building, tier by tier, or story by story. (Fosseen Tr. II, p. 811.)

There is no question of authority in Wells (Exhibit 138, Tr. II, p. 812).

Mr. Wells had authority to move the terra cotta without any order from the manufacturer. The terra cotta was there at his disposal at any time without any payment and without any reservation whatsoever. (Fosseen Tr. II, p. 824.)

Willis E. Clark, with reference to storing of material at Tacoma, stated:

> "I reported it to Mr. Wells, explaining to him that negotiations had taken place, and asked if the conclusion of such an arrangement would be satisfactory to him and entirely in accordance with his desires. He stated it would be so and then made arrangements with the transfer company and filed formal application with the railroad company for the space, and they permitted us to use it.
>
> "I told Mr. Wells that his instructions to the transfer company were to haul the material to the building any time Mr. Wells might call for it.
>
> "Mr. Wells had a man on the ground checking some of the material as it came from the cars."

Albert Glazier testified:

> "I received checking lists from the transfer company and checked off the material as it arrived here in the yard. At the time I received the checking lists a duplicate set went to Mr. Wells. Once or twice Mr. Wells came down and found a piece that did not suit him. I made a note of it and had it replaced. After the car was unloaded, I went up with my checking list to Mr. Wells. (Glazier Tr. II, p. 832.)

This, in substance, is all of the material evidence bearing upon the status of the material made and shipped by appellant.

This appeal involves the construction of the mechanics' lien statute of the State of Washington.

Section 1129, Rem. Comp. Stat. of Wash., 1922, provides:

> "Every person performing labor upon or *furnishing* material *to be used* in the construction, alteration or repair of any * * * building, * * * has a lien upon the same for the * * * material furnished."

The trial court denied appellant a lien upon the premises because the material was not delivered at the premises.

We contend this to be a narrow and limited interpretation of the language used and contrary to the provisions of the lien statute itself, which provides that it shall "be liberally construed to a view to effect their objects." Sec. Rem. 1147, Comp. Stat. 1922.

Furthermore, it is not consistent with the methods necessarily employed nor the physical conditions surrounding the construction of buildings in the larger cities of the state. It must be apparent from casual observation that in the construction of a sixteen story building in any of the cities of Washington, it would be physically impossible to assemble all classes of materials at or upon the premises. From the earliest times the Supreme Court of Washington has given the language of this statute a broad and liberal construction.

In *Huttig Bros. Mfg. Co. vs. Denny Hotel Co.*,

6 Wash. 122, it was held that the manufacturer of material, especially designed but in part not used in the building, was entitled to a lien for both the part used and the portion unused.

In the case of *Gould vs. McCormick*, 75 Wash. 61, 47 L. R. A. (N. S.) 765, a lien was allowed under this statute for services of an architect in preparing plans and specifications. The court there says:

> "While the decisions upon this question are by no means harmonious, the great weight of authority as well as the better reason appears to support the view that the lien exists where the language of the statute is general. It will be noted that the language of the statute above quoted is general and comprehensive in its terms. Had the legislature intended it not to be sufficiently broad to include the labor of the architect in preparing plans and specifications, according to which the building was constructed, and not superintending the construction thereof, it would doubtless have made use of more restrictive terms."

In the case of *Western Hardware & Metal Co. vs. Maryland Casualty Co.*, 105 Wash. 54, an action was brought by a contractor against a surety company on a bond, filed pursuant to Sec. 1159, Rem. Comp. Stat. 1922, which requires public corporations to exact a bond from contractors on public works conditioned to pay "any person or persons performing such services or furnishing material to any sub-contractor", etc. The facts in that case

are that a contract was entered into with School District No. 1, by which the contractor agreed to furnish the material for and install a heating and ventilating plant in the West Queen Anne school house in the City of Seattle. The contractor sublet the furnishing and installing of the sheet metal work of the heating plant to the Zimmerer Manufacturing Company. The sub-contractor was the owner of and conducted a sheet metal shop in Seattle wherein it pressed and worked sheet metal into such a form as was necessary for whatever jobs they might have on hand. The sub-contractor, not having sheet metal on hand for the performance of the sub-contract, purchased from the Western Hardware and Metal Company the sheet metal for the purpose of performing the sub-contract with the understanding that the sheet metal so furnished was for the sub-contract and was to go into and be a part of the heating and ventilating plant. The sheet metal so purchased was delivered to the sub-contractor at the shop. Notice was given to the principal contractor of the delivery of this material and that the surety would be held for the purchase price therefor. Only a portion of the material so furnished and delivered actually went into and became a part of the structure. Before completing the contract the sub-contractor went into bankruptcy. Claim was filed by the materialman against the bond. It was contended

by the bonding company that it was not liable for the sheet metal furnished to the sub-contractor, which was not actually used in the construction of the heating and ventilating plant. Counsel for appellant invoked the law announced in some of the lien decisions, holding that actual use of the material in the construction of the building is indispensable to the creation of a lien right.

Justice Parker in a well considered opinion, in which the decisions are exhaustively reviewed, sustained the right of lien for the whole of the material delivered at the shop of the contractor. The opinion was concurred in by all of the judges and later, upon a rehearing *en banc*, a majority of the court still adhered to the opinion theretofore filed. The court says:

> "It would seem, therefore, that since our lien statute secures by a lien payment for 'furnishing material to be used in the construction,' etc., and our bonding statute provides for the securing by bond the payment of 'sub-contractors and materialmen and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work', there is an analogy between these statutes in so far as we are here concerned with the question of the necessity of the material furnished by respondent going into the structure of the plant, in order to give respondent the right of recovery upon the bond. We are not here concerned with provisions and

supplies which are not intended to go into the structure but which are consumed in carrying on the work, the payment for which our bond statute contemplates securing by the bond, but which our lien statute does not secure. These observations, we think, render it plain that the mechanics' and materialmen's lien decisions are as applicable and helpful, in our personal inquiry, as bond decisions."

The court further says:

"While we concede that the authorities are not harmonious upon the question of the necessity of material actually going into and becoming a part of the structure in order to support a lien right, which is the particular question we are now considering, we think the decided weight of authority is in harmony with the early holding of this court in the *Denny Hotel* case and the cases from other courts above quoted."

This view of the law finds support in the following authorities:

Trammel vs. Mount, 68 Texas 210, 4 S. W. 377, 2 Am. St. 479;

Watts vs. Whittington, 48 Md. 353;

Nelson et al vs. Iowa East R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124;

Burns vs. Sewell, 48 Minn. 425, 51 N. W. 224;

Crane Co. vs. U. S. Fidelity & Guaranty Co., 74 Wash. 91;

Phillips, Mechanics' Liens, 3rd Edition, p. 260, 2 Jones, Liens, 3rd Edition, Sec. 1329.

Decisions of other courts are in harmony with this construction of the Washington Lien Statute.

John Paul Lbr. Co. vs. Hormel, (Minn.) 63 N. W. 718;

Berger vs. Turnblad, (Minn.) 107 N. W. 543.

Thompson-McDonald Lbr. Co. vs. Morawetz, (Minn.) 149 N. W. 300.

A true interpretation of the word "furnishing" as used in the statute does not necessarily mean "delivery" at or upon the premises.

The case of *McEwen vs. Montana Pulp & Paper Co.*, (Mont.) 90 Pac .359, involves the construction of the mechanics' lien statute of the state of Montana. The court there says:

> "Coming then to the main question in the case, we find that our statute, relating to mechanics' liens (Section 2131 of the Court of Civil Procedure) reads in part as follows:
>
> 'Every person wishing to avail himself of the benefits of this chapter must file with the County Clerk of the county in which the property is situated, and within ninety days after the material or machinery *has been furnished*, a just and true account of the amount due him', etc.
>
> We are to determine when this machinery *was furnished* within the meaning of the law."

The court then states the terms of the contract, which provided that certain machinery was to be shipped f. o. b. cars, Wellsville, New York, in knockdown form. On arrival and destination the

shipper was to be notified and would then furnish men to rivet the tanks together. Shipment of all materials, for which a lien was claimed, was made from Wellsville, New York, on or prior to June 6, 1900. The materials actually reached Manhattan on or about the 18th day of June. The invoice for the same was dated, Wellsville, June 8, 1900.

The court concludes:

> "We find, therefore, that this material having been furnished on or before June 6, (the date of shipment from Wellsville, New York) more than ninety days prior to September 14, when the claim for lien was filed, the mechanics' lien law was not complied with and the lien did not attach."

In the case of *Tibbets vs. Moore*, 23 Cal. 208, it was held that the lien of a materialman accrues at the time he has the materials, which he has contracted to furnish, ready for delivery at the place where he has agreed to deliver them. The court said:

> "The question is whether or not the word 'furnished', as used in the statute, means 'delivered at the building', in the construction of which the materials are furnished. *We think that such is not its reasonable construction.*"

See also:

Watson Coal & Mining Co. vs. James, 72 Iowa 184, 33 N. W. 622;

Congdon vs. Kendall, 53 Nebraska 282, 73 N. W. 659.

In the latter case it was held that, under a contract to make certain machinery and deliver it f. o. b. cars at a designated place for a stipulated sum the machinery is furnished with the meaning of the Nebraska mechanics' lien law, when it is delivered, in accordance with the contract, *on board the cars* at the place named, without expense to the purchaser; and to obtain a lien therefor, the claim for a lien must be filed within four months from that time.

See also:

Manufacturing Co. vs. Hunter, 15 Nebraska 32, 16 N. W. 759;

King vs. Cleveland Shipbuilding Co., 50 Ohio State 320, 34 N. E. 436.

In the Minnesota case, *Lamoreaux vs. Andersch*, 150 N. W. 908, it was held that an architect who furnishes plans and specifications for the construction of a building is entitled to a lien upon the building and land upon which it is constructed, though he does not supervise the construction.

The statute under consideration in that case afforded a lien to "a person contributing * * * material to the improvement of real estate," etc. Sec. 7022 Gen. S. L. 1913.

The court in its opinion said:

> "We think the plaintiffs would have been entitled to a lien if their plans had been used in the construction of the building on the premises. Is this right to a lien lost

when the owner, through no fault of the architect, does not use the plans or make the contemplated improvemen? Liberal construction of the lien statute is the settled policy of this state."

See also:

Minneapolis Sash & Door Co. vs. Hedden, 154 N. W. 511;

State Loan Company of Minneapolis vs. White Earth, Etc. Co., (N. D.) 157 N. W. 834;

North Land Pine Co. vs. Northern Insulating Co., (Minn.) 177 N. W. 635, p. 637.

Judge Cushman in his memorandum opinion after quoting the statutes says:

"While it may be true that in a controversy solely between the materialman or contractor or sub-contractor and the owner, the owner will be estopped to deny the lien because of failure to deliver the material, where any act of his or act with which he may be charged has in any way caused such failure, yet when the substantial controversy is as it is here, between the lien claimants, no such rule should be applied. While the contractor or sub-contractor may, where material has been delivered to him for work upon it by him, be considered in some respects as agent of the owner, the owner is not the lien claimant's agent nor will the lien claimant himself be considered the agent of the owner in respect to his own lien claims where he claims to have retained the material at his shop or factory for the purpose of completing necessary work upon it, or be-

cause the owner was not prepared to receive it at the building being constructed."

This reasoning is fallacious in view of present day methods in preparation for construction of large buildings.

Every contractor, sub-contractor, or materialman was obliged to and did examine the plans and specifications as a whole for this building. Each knew the kind and character of material to be delivered by the other. Each well knew the orderly sequence of the delivery and use of various classes of material which entered into the construction of this building. For example, the manufacturer of terra cotta knew that before its material could be used, the steel had to be delivered and in place, and in turn the manufacturer of millwork knew that its material could not be used until the building had been enclosed and was in the last stages of completion.

There is no reasonable basis, therefore, for the theory that a lien may be had for material "furnished" as against the owner but not as against other claimants whose material had been first used.

The testimony of all of the witnesses for appellant, heretofore quoted, shows that the terra cotta placed on the property of the Great Northern Railroad Company at Tacoma was shipped at the request of the superintendent of construction of the building. While it is true that the manufacturer agreed

to pay the expense of the hauling of the material from the railroad yards to the building, yet, as stated by the witness Fosseen, president of appellant company: "Mr. Wells had authority to move the terra cotta without any order from the manufacturer. The terra cotta was there at his disposal at any time without any payment and without any reservation whatsoever." (Tr. II., p. 824.)

It had been placed on the railroad property by and with his advice and consent and only for the reason that it was physically impossible to receive it at the building or on the premises.

Let us assume that it had been placed in the street adjacent to the property or on a vacant lot across the street under like circumstances. Would it be contended with any measure of success that the manufacturer had not furnished the material to be used in the construction of this building? If, under such conditions, the manufacturer would be entitled to a lien, is there any reasonable basis for the claim that he would not be entitled to such lien because all of the property within four or five blocks of this structure was occupied by buildings and the place where the material was stored was the nearest and most convenient space available, and so determined to be the most convenient place by the superintendent of the building himself?

The theory of the cases heretofore cited, which have sustained the right of lien for materials pre-

pared but not actually brought to the premises and used in the construction of the improvement, is well stated in the case of *Trammel vs. Mount, supra,* as follows:

> "The language of the statute does not require such a delivery nor does it require that the material should actually enter into the construction of the improvement. To furnish materials for the construction of the house and to furnish materials which enter into its construction are very different things. To give our statute the later construction is to strain its words beyond the usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently designed to give them."

The District Judge in his memorandum opinion states:

> "The court, however, finds that the shipment was made by claimant, rather to avoid the higher freight rates imminent than to accommodate the building company, although it may have been in part for the later purpose, and that it never passed into the possession and control of the building company."

We have searched the record in vain for a word of testimony from any party to the case that will support this statement. On the contrary the testimony of all of the representatives of appellant stands absolutely uncontradicted and undenied in any respect touching the reason for the delivery of the material at Tacoma.

The District Judge denied the right of lien to appellant entirely upon the authority of the case *of Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74. The facts in that case are:

The Holly-Mason Hardware Company, doing business at Spokane, some distance from the place where the buildings were being constructed, delivered materials to a common carrier, some times a railroad company and other times an express company, for transportation to the shipping station nearest the site of the building, some two and a half miles therefrom. The actual receivers of the goods were usually draymen or their employes, and respondent was unable to show that more than a small quantity of them actually reached the building. Under these circustances, the right of lien was denied.

No reference is made in this opinion to the case of *Western Hardware & Metal Company vs. Maryland Casualty Co.*, 105 Wash. 54, and there is no suggestion by the court of any intention to overrule the rule of decision in that case. The materials ordered and shipped by the Hardware Company were not especially designed and there was no showing that they were intended to be used for the building under construction.

Under the facts of that case, Judge Fullerton rests his decision on the fact that failure to show more than delivery to a common carrier might re-

sult in the grossest frauds on the part of contractors and materialmen and is not necessary for the protection of bona fide material men.

There is no question of fraud in this case or the bona fides of the delivery of the material involved in this case at Tacoma, subject to the control and order of the superintendent of the building. It can hardly be contended that Judge Fullerton did not have the *Western Hardware & Metal Company case* in mind, for he partciipated in its decision.

In the *Holly-Mason Hardware Company* case, no reference whatever is made to any of the long list of cases referred to and relied upon in the *Western Hardware & Metal Company* case, except the Washington case of *Gate City Lumber Company vs. Montesano*, 60 Wash. 586, and the earlier opinion disposes of that case with the observation that a large part of the lumber was diverted and "there was no understanding and no necessity for the lumber being delivered at a shop or place where the contractor or sub-contractor was specially preparing his material before being placed in the structure." (105 Wash. 68.)

Application of Payment

A payment of $20,000 was made in August, 1920, on account.

The District Judge found material of the value of $58,657.50 finished, shipped and stored at Tacoma, and the uncontradicted testimony of appel-

lant's witnesses was that material of the value of $29,023.28 remained at the plant.

If it shall be determined that appellant is entitled to a lien for the material shipped to Tacoma and not for the work expended upon the material which remained at its plant, the question of the application of the $20,000 payment becomes important.

The authorities seem to be uniform that where neither party makes a specific application, a court of equity will make the application to the unsecured in preference to the secured portion of the debt.

By the common law in most of the states of this country, while there are cases laying down the rule that the creditors should be preferred, the general rule is that the court will make the application in such a manner, in view of all of the circumstances of the case, as is most in accord with justice and equity and will maintain the rights of both creditor and debtor. (30 Cyc. 1241.)

It is generally held that the court will apply a payment to an unsecured debt in preference to one for which the creditor is secured and a debt for which the security is most precarious, where a creditor holds more than one security.

30 Cyc. 1246;

21 R. C. L. 100;

Monson vs. Meyer, 100 Illinois 105, 60 N. E. 83;

Barbee vs. Morris, 221 Illinois 382, 77 N. E. 589.

In *Casey vs. Weaver*, (Mass.) 66 N. E. 372, seeking to enforce a mechanics' lien, where it appeared that the lien creditor was to furnish labor and material on an entire contract for an entire contract price, and be also paid a certain sum in partial payment, it was held that the partial payment was a payment under the contract and not a payment for labor or materials. It was also held, however, that the worth of the labor performed by the petitioner being less than the amount due on the contract debt after the partial payment was made, the lien could be enforced for the full amount.

In *North vs. LaFlesh*, (Wis.) 41 N. W. 633, the plaintiff's action consisted of advances made by him to pay freight chargeable to the defendant, for which he had no lien, and was for materials furnished for which he had a lien, and it was held equitable to apply cash payments which had been made on general account to the non-lienable items.

See also:

Wardlaw vs. Troy Oil Well, (S. C.) 54 S. E. 656.

Kunz vs. Tome, 9 Fed. 532;

Field vs. Holland, 6 Cranch 8;

Pierce vs. Sweet, 33 Pa. St. 151;

Foster vs. McGraw, 65 Pa. St. 468;

Howell vs. Noland, 27 Wash. 338.

Assignment No. 8

If a lien is sustained, for the material delivered at Tacoma, of the value of $58,657.50, appellants will be entitled to allowance for attorneys' fees.

Scott Henderson, Esq., of the Tacoma Bar, testified that a reasonable allowance would be $6,500. (Tr. II, p. 854.)

P. C. Sullivan, Esq., of the Tacoma Bar testified that a reasonable fee would be ten per cent of the amount of the recovery. (Tr. II, p. 853.)

Assignment Nos. 7, 9, 10 and 11

In the interests of brevity and to avoid encumbering this brief with burdensome references to authorities, we adopt the statement of the case and the unanswerable argument presented by Judge T. L. Stiles, counsel for Ben Olson Company, one of the appellants in this group of cases.

We respectfully submit that the judgment of the District Court should be reversed and that this appellant should be awarded a materialman's lien, attorneys' fees and costs.

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